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SUPREME COURT, U. S.

No. 73-432

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,

Respondent,

vs.

ANTHONY ESPOSITO,

Petitioner.

PETITIONER'S REPLY BRIEF

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In its brief (pp. 6, 8-9), the government quotes from a Senate Judiciary Committee Report (S. Rep. No. 91-1296, 91st Cong., 2d Sess.) in support of its argument that the amended Criminal Appeals Act should be construed as broadening the government's right of appeal in criminal cases, and that as broadened it would permit appeal in this case.

The Senate Judiciary Committee Report, on which the government relies, referred to Senate Bill 3132. But Senate Bill 3132 was significantly different from the amendment to the Criminal Appeals Act which was ultimately enacted. Senate Bill 3132 provided:

> "Except as otherwise expressly provided by this section, in a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information *or terminating a prosecution in favor of a defendant* as to any one or more counts, except that no appeal shall lie from a judgment of acquittal." (Emphasis added.)

In the version finally adopted, the italicized portion above was eliminated altogether, and the portion relating to acquittals deleted in favor of "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

The Conference Committee which redrafted the proposed amendment gave no reason for the change from the Senate draft. The Third Circuit Court of Appeals has concluded that the apparent reason for the change was that "the Senate's draft would have permitted appeals in cases where the double jeopardy clause would have prohibited them." *United States* v. *Pecora,* 484 F.2d 1289, 1293-4 (3d Cir. 1973).

The government argues that the change was made "merely to confirm that the amendment was not meant to infringe upon the constitutional right against double jeopardy" (p. 9). As we point out above, the legislative history is silent as to the reason for the change. Even if it were made for the reason stated by the government, that explains only the rewriting of the last phrase and not the very significant change in the description of the types of orders from which appeal is permitted.

The deletion of the critical phrase "terminating a prosecution in favor of a defendant" significantly narrowed the types of orders from which an appeal could be prosecuted.

Its elimination calls into question any prior expressions of Congressional purpose to broaden to constitutionally permissible limits the government's right to appeal in criminal cases.

In any event, the government's brief recognizes the importance of the question presented and the absence of any definitive resolution of it.

In response to our additional argument that the District Court's order was an acquittal, precluding appeal, the government takes the position that even if it was an acquittal, appeal is justified under the newly amended Criminal Appeals Act (18 U.S.C. § 3731). The Solicitor General argues that a government appeal, if successful, would result in a judgment in accordance with the jury verdict and not in a new prosecution and that therefore it is not contrary to the double jeopardy clause. (pp. 11-12.)

That argument contradicts constitutional precepts declared by this Court over the last century that "an acquittal can 'not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . .' " *United States* v. *Sisson*, 399 U.S. 267, 289 (1970). See also *Kepner* v. *United States*, 195 U.S. 100, 130 (1904). However, the fact that the Solicitor General interprets the newly amended act as justifying governmental appeal from directed post verdict acquittals and claims that it is applicable to the instant case, fully justifies review and resolution by this Court of the issue. It is a question with serious constitutional and administrative implications and its resolution will have a profound effect on federal criminal jurisprudence.

We submit that the government's Brief in Opposition merely emphasizes the importance and difficulty of the issues involved and the necessity for a full review on the merits by this Court.

Respectfully submitted,

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